BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

MELVIN KUCH,)) **Appellant.**)) **v.**)) **STATE OF WASHINGTON,**) **DEPARTMENT OF ECOLOGY,**)) **Respondent.**))	**PCHB NO. 92-218** **SUMMARY JUDGMENT**

This matter came on before the Honorable William A. Harrison, Administrative Appeals Judge, presiding, and Board Members Robert V. Jensen, Chairman, Richard C. Kelley and James A Tupper, Jr.

It is an appeal from an Order of Compliance and related Order of Cancellation regarding Permit No. G3-21802P for the appropriation of public ground water.

Appearances were as follows:

1. John F Strohmaier, Attorney at Law, for the appellant, Melvin Kuch.

2. Mark C. Jobson, Assistant Attorney General, for the respondent, State of Washington, Department of Ecology.

This matter was presented in writing upon a Stipulated Statement of Facts. The Stipulated Statement of Facts is attached hereto and incorporated herein as Appendix A. Appellant has filed a Motion for Summary Judgment seeking rescission of the permit

cancellation. Respondent, Ecology, has filed a cross Motion for Summary Judgment, seeking affirmation of the Order of Compliance.

Having revewied the motions together with supporting affidavits and documents, responses and reply to motions and the Stipulated Statement of Facts and the record and file herein, and, being fully advised, the following is hereby entered:

UNCONTESTED FACT

I

The affidavits and stipulated Statement of Facts herein show that there is no genuine issue as to any material fact.

II

The appellant, Melvin Kuch, owns certain range land and irrigated pasture in Lincoln and Grant Counties near Marlin, Washington. Appellant has farmed the property since 1963.

III

Crab Creek runs through the property and has been used for irrigation by appellant under a water right claim having a priority of 1876. The water flow in Crab Creek has been undependable.

IV

Since 1963, appellant has relied on ground water irrigation. A ground water certificate (No 5828-A) with priority date of 1963, and a groundwater claim executed in 1974 both resulted in dry wells.

V

Due to this lack of water, the appellant filed an application for a ground water permit on September 21, 1973, for the irrigation of 400 acres at 3,000 gallons per minute for 1,000 acre feet per year. This application contemplated two wells.

VI

The application was granted. Ecology issued ground water permit No. G3-21802P, to the appellant on January 30, 1975.

VII

The ground water permit provided for completion of the two wells by April 1, 1977.

VIII

Appellant was unable, due to his financial condition, to complete construction of the wells by April 1, 1977. He therefore sought a series of extensions of that completion date. By five extension requests successively made by appellant and granted by Ecology, the completion date was moved to April 1, 1982.

IX

The appellant began construction of one well in April, 1976. That well was completed by September, 1978. Water from the well was applied to irrigation in 1979. The well was fitted with an electric pump and served 250 3" handlines and 5 one-quarter mile 4" wheel lines. It produced 2,600-3,000 gallons per minute Appellant has used the well in each irrigation season from 1979 to the present.

X

By 1981, the appellant had drilled the second well to bedrock without producing water. The second well was never completed due to lack of financing.

XI

The following appears in the succession of correspondence between Ecology and the appellant from 1977 to 1982:

1. The appellant's second request to Ecology for extension of the completion date states: *"One well is completed and will pump 2,000 gallons."* This is dated September 11, 1978, and signed by appellant. (Exhibit A-6).

2. The fourth extension was approved by Ecology's letter stating:

> *" .. You have had a number of extensions in the past and apparently have completed one well with a production capacity of 2,000 gallons per minute. .*
> *On April 1, 1981, a proof investigation will be conducted and a certificate will issue for only that amount of water and number of wells placed to beneficial use at the time of the field investigation."*

This is dated September 19, 1980, and signed by Ecology's District Supervisor in Spokane. (Exhibit A-11). Ecology did not conduct the proof investigation on April 1, 1981 Such an investigation would have shown a well and that water had been placed to beneficial use under the permit.

3. Ecology notified appellant that he must file a form entitled "Completion of Construction and Proof of Appropriation" by the then completion date of April 1, 1981.

The notice, dated February 9, 1981, indicted that failure by appellant to so file the form would result in an order to show cause why the permit should not be cancelled. (Exhibit A-12) Neither the filing nor show cause order occurred. Instead a further extension was granted.

4. The fifth and final extension repeats the admonition to file the form or show cause. This extension is dated March 8, 1982. (Exhibit A-13). It is signed by Ecology's District Supervisor in Spokane.

5. An Order of Cancellation for the permit (No. G3-21802P) was issued by Ecology under date of August 2, 1982. The Order of Cancellation provides on its face (Exhibit A-14), that it is appealable to this Board. It is signed by Ecology's Assistant Director in Olympia.

XII

During 1982, appellant was very occupied taking care of his two teenage sons, Bill, who was then 18, and Dan, who was then 16. Appellant's second wife had recently died in an automobile accident in November, 1981. Dan, the youngest son was suffering from Huntington's Chorea, a hereditary disease that causes progressive mental deterioration. Dan's disease had by then affected his schooling and his memory. Dan died of the disease several years later. During that time period appellant's eldest son, Rick, had also died from Huntington's Chorea. The same disease had killed appellant's first wife. Finally, appellant

was taking care of his mother's financial affairs as she had been then recently placed into a nursing home in Odessa, Washington.

XIII

The fifth and final extension letter contained a requirement to file the Completion of Construction notice by April 1, 1982, or show cause why the permit should not be canceled. (Exhibit A-13 referred to at paragraph 4 of Fact XI, above). This letter was sent by certified mail and signed for by appellant's son, Bill.

XIV

The Order of Cancellation (Exhibit A-14 referred to at paragraph 5 of Fact XI, above) was sent by certified mail and signed for by appellant's son, Dan.

XV

Appellant did not receive, nor was he aware of the show cause letter (Exhibit A-13) or the Order of Cancellation (Exhibit A-14).

XVI

Appellant had not received the Order of Cancellation until subsequently notified by this proceeding.

XVII

This proceeding was prompted by Ecology's issuance and appellant's appeal of an Order of Compliance issued in November, 1992. That order required the appellant to cease

and desist from any further withdrawal of ground water from the well at issue. The Order of Compliance is grounded upon the finding:

> *3. That no permit, certificate or other authorization had been issued by the Department of Ecology, or one of its predecessor agencies, authorizing the use of said well to irrigate the hereinbefore described parcels of land.*

Appellant has denied this finding in his appeal here.

XVIII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

There being no genuine issue of material fact, and for the reasons which follow, appellant is entitled to judgment as a matter of law. We hold that notice of the Order of Cancellation was not given to appellant until these proceedings, that the Order of Cancellation is reviewable within these proceedings, and that the Order of Cancellation was improper as to the well in question We remand to Ecology for issuance of a certificate allowing the appellant to appropriate public ground water.

II

Notice. Notice of the cancellation of a permit to appropriate water is provided by statute as follows at RCW 90 03.320:

> *". . If the terms of the permit or extension thereof, are not complied with the department shall give notice by registered mail that such permit will be canceled unless the holders thereof shall*

show cause within sixty days why the same should not be canceled. If cause be not shown, said permit shall be canceled."

III

As a preliminary matter, Ecology urges that cancellation occurs by operation of law following the 60 day show cause period:

> *"...After 60 days the permit cancels unless the permittee responds. The statute is quite clear: "If cause be not shown, said permit shall be canceled. RCW 90.03.320* (Emphasis added.) *This provision of the code is unchanged since 1917. Therefore, and without any necessary further action by Ecology, the permit was canceled by operation of the statute. If Kuch chose to appeal, his opportunity to appeal was upon receipt of the show cause order. Kuch had 30 days from March 10, 1982 (date of delivery) in which to appeal the show cause order* Ecology Memorandum, pp. 4-5.

We disagree. This interpretation is inconsistent with Ecology's affirmative issuance of the "Order of Cancellation" dated August 2, 1982, or approximately 120 days subsequent to commencement of the 60 day show cause period It is also inconsistent with the prevailing policy, apparent to us in other cases, by which Ecology customarily issues the type of cancellation order issued here Finally, the interpretation is inconsistent with the language of the Order of Cancellation dated August 2,1982, that the same is appealable here "within thirty (30) days of receipt of this order." An administrative decision maker may not claim that an aggrieved party's appeal is untimely if the action was commenced within the time period specified in a notice that the decision maker sent to the aggrieved party. See Anderson v. Issaquah, 70 Wn.App. 64 (1993).

Finally, on this point, Ecology's Order of Cancellation is consistent with the meaning of RCW 90.03.320 which is that a permit shall be canceled by an affirmative order that cancellation has taken place. Proper notice of this order of cancellation, here issued on August 2, 1982, must be made to the holder.

IV

We next turn to what constitutes proper notice of an order of cancellation. Under the second to last sentence of RCW 90.03.320, the requirement to "show cause", the "department shall give notice by registered mail." Under the last sentence of RCW 90.03.320 there is no separate or discrete prescription for notice. Reading the two sentences in tandem, we interpret the show cause and cancellation provisions to be two steps in a single procedure. In interpreting a statute we must ascertain and given effect to the intent and purpose of the legislature, as expressed in the act, which must be construed as a whole. Effect should be given to all the language used and all of the provisions of the act must be considered in their relation to each other and, if possible, harmonized to insure proper construction of each provision. Burlington Northern v. Johnson, 89 Wn.2d 321, 572 P.2d 1085 (1977). Reading the provisions as a whole, we conclude that notice by registered mail employed in the show cause phase was intended by the legislature to apply also to an order of cancellation.

V

The action taken by Ecology in sending the Order of Cancellation, dated August 2, 1982, by certified mail is consistent with the foregoing conclusion (III, above) concerning the

proper means for giving notice of an Order of Cancellation. When a statute calls for delivery by registered mail, then delivery by certified mail, return receipt requested, is the equivalent and is permitted. RCW 1.12.060.

VI

Next we turn to the question of when notification by registered mail is complete. In Van Duyn v Van Duyn, 129 Wash. 428, 225 Pac. 444, 227 Pac. 321 (1924) notice of rejection of a creditor's claim against an estate was required to be given by registered mail. A 30 day period followed in which the rejected claimant could appeal. In that case, the rejection was sent on one day and actually received by the claimant on the next. Initially, the Supreme Court held:

> *"It seems to us that, when the notice of rejection is given to the claimant by registered mail or delivered to him by someone in person, the notification is not complete until actually received by the claimant, since the probate statute is wholly silent upon the question of when the notification is complete.* (Emphasis added.)

On petition for rehearing however, this was modified as follows:

> *For the purpose of disposing of that question as presented in this case we think it sufficient for us to now say and decide that, when the notice of the rejection of the claim is given to the claimant by registered mail, the notification is in no event complete, so as to start the thirty day statute running, until a reasonable time for the transmission and receipt of the notice has elapsed following the deposit of the notice in the post office. We therefore conclude that July 21st, being the day on which notice was actually received by respondents, that being the day following its deposit in the post office, was the day of their*

notification of rejection of their claim within the meaning of the statute as applied to this particular case. This restatement of the law applicable to this case does not affect the conclusion reached in the Departmental opinion. We are satisfied with that opinion in all other respects.

The petition for rehearing is therefore denied. (Emphasis added.)

VII

To summarize, Van Duyn did not go so far as to require actual receipt of registered mail to make notification by that means complete And it holds that notification "is in no event complete" until a reasonable time for transmission and receipt. But when, thereafter, is notice by registered mail complete? The Supreme Court spoke again in Robel v. Highline Public School District, 65 Wn.2d 477 398 P.(2d) 1 (1965. In that case:

" .. the mail carrier undertook delivery of the letter but received "no response." Pursuant to postal regulations, the carrier left a "Mail Arrival Notice" indicating that certified mail was being held for appellant and that she could either call for or request delivery thereof. The letter remained uncalled for and was returned to respondent on April 23rd." Robel, at p. 479.

This process was repeated three times. The court noted:

Appellant [the intended recipient] admitted receiving at least one of the three notices left by the mail carrier. Robel, at p. 480. [Brackets added.]

The court then held the Van Duyn rule applicable and that:

We do not conceive, however, the Van Duyn rule to be so broad as to permit the intended recipient of certified or registered

mail to ignore customary and established methods of postal notification and delivery of such mail.

Robel, in short, involved actual notice of the mailed letter, to the intended receipient, despite the failure of actual receipt. This was held sufficient to complete notification by registered mail.

VIII

The question posed earlier as to when notice by registered mail is complete was more fully answered in CHG Int'l v Platt Electric, 23 Wn.App. 425, 597 P.2d 412 (1979)

> *Because the statute requires either personal service of the notice or delivery by certified or registered mail, the intent of the legislature is that there be actual notice. See Robel v. Highline Public Schools, Dist. 401, 65 Wn.2d 477, 398 P.2d 1 (1965); Van Duyn v Van Duyn, 129 Wash. 428, 225 P. 444, 227 P. 321 (1924.* (Emphasis in original.).

Thus, while Van Duyn did not require actual receipt of the registered letter, and declared that notification is "in no event complete" until a reasonable time for transmission and receipt, CHG requires the element of actual notice of the registered letter, a factor which was present in both Van Duyn and Robel.

IX

We note however that in CHG, the certified letter was sent to the wrong address. The notice was received back by the sender, a liening subcontractor, as "unclaimed". CHG, at 23 Wn.App 426-27. That distinguishes the case from this situation, where the notice was

received and signed for at the correct address. by the son of the addressee. It was never returned to Ecology as undelivered. We believe that this case is more appropriately analyzed by analogy to substituted service, under RCW 4 28.080(15). That statute allows service on individuals, either "personally, or by leaving a copy of the summons at the house of his actual abode with some person of suitable age and discretion then resident therein".

X

The Supreme Court recently upheld service, under that statute to a 26 year old daughter, who had stayed at the defendant's house the night before service occurred. The daughter lived at a separate apartment, and infrequently stayed at the defendant's residence. The court acknowledged that personal service has not "been regarded as indispensable to the process due to residents" in all circumstances. Wichert v. Cardwell, 117 Wn.2d 148, 151, 812 P.2d 858 (1991) The court stated that to satisfy due process: "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it". Id. (citing Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306, 314, 94 L.Ed. 8965, 70 S.Ct. 652 (1950). The inquiry then, under this test, is: "was [service] . . . reasonably calculated to provide notice to the defendant?" Wichert, at 117 Wn.2d 152.

XI

The statute allowing for substituted service allows service upon someone of suitable age and discretion" RCW 4.28.080(15). The 16-year-old son was of suitable age. Miebach v. Colasurdo, 35 Wn App 803, 805, 808, 670 P 2d 276 (1983) (holding that a 15-year-old daughter was of suitable age to accept service).

XII

We do not believe, however, that the 16-year-old son was of suitable discretion. The unchallenged evidence leaves the conclusion that he was not capable, due to a fatal brain condition, to receive service.

XIII

In the case at hand, appellant did not receive either actual or constructive notice of the Order of Cancellation until these proceedings. Unlike Van Duyn, he did not receive the letter. Unlike Robel he did not receive notice of the letter. Moreover, appellants did not receive substituted service because his minor son was gravely afflicted at the time in question.

XIV

Neither actual, nor substituted notice of the Order of Cancellation to the appellant having occurred until these proceedings, appellant's appeal timely invokes review of the Order of Cancellation.

XV

The doctrine of substantial compliance may be used to meet the requirements of the water code under the facts presented here. The substantial compliance doctrine exists specifically for those situations when "the literal expression of legislation may be inconsistent with the general objectives or policy behind it .." Murphy v Campbell Inv. Co., 79 Wn.2d 417, 420, 486 P.2d 1080 (1971) as quoted in Department of Ecology v Adsit, 103 Wn.2d 698, 694 P 2d 1065 (1985) Here, although the form was incorrect, the substantive information shown by the applicant met the legislative intent of notifying the State that the water had been put to beneficial use.

XVI

Appellant substantially complied with RCW 90.03.330, and perfected a portion of his permit prior to the Order of Cancellation dated August 2, 1982. That Order of Cancellation should be reversed. The permit should be remanded to Ecology for a proof investigation and certification bearing the priority date of the application.

XVII

Appellant having perfected a portion of his permit and having shown entitlement to a certificate, the Order of Compliance dated November 4, 1982, should be reversed.

XVIII

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From the foregoing, the Board issues this:

ORDER

1. The Order of Cancellation dated August 2, 1982, is reversed.

2. The Order of Compliance dated November 4, 1992, is reversed.

3. The permit No. G3-21802P is remanded to Ecology for a proof investigation and certificate bearing the priority date of the application.

DONE at Lacey, WA, this 28th day of April, 1994.

POLLUTION CONTROL HEARINGS BOARD

ROBERT V. JENSEN, Chairman

RICHARD C. KELLEY, Member

JAMES A. TUPPER, JR., Member

P92-218